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No. 06-939

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the State of California's regulation of noncoercive employer speech about union organizing, California Assembly Bill No. 1889, Cal. Gov't Code §§ 16645.2, 16645.7, is preempted by federal labor law.

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PARTIES TO THE PROCEEDINGS

Petitioners in this case are the Chamber of Commerce of the United States of America; California Chamber of Commerce; Employers Group; California Hospital Association (*fka* California Health-care Association); California Manufacturers and Technology Association; California Association of Health Facilities; Aging Services of California (*fka* California Association of Homes & Services for the Aging); Marksherm Corporation; Zilaco, Inc.; and Front Porch (*fka* Internext Group) ("petitioners").

Respondents in this case are Edmund G. Brown Jr., Attorney General, in his capacity as Attorney General of the State of California; California Department of Health Services; Frank G. Vanacore, as the Chief of the Audit Review and Analysis Section of the California Department of Health Services; and Diana M. Bonta, R.N., Dr., Ph.D, as the Director of the California Department of Health Services ("respondents"). Respondents California Labor Federation, AFL-CIO, and American Federation of Labor and Congress of Industrial Organizations intervened in the district court ("intervenors").

Other parties in the Ninth Circuit were Bettec Corporation; Zilaco; Beverly Health & Rehabilitation Services, Inc. (*dba* Beverly Manor Costa Mesa); and Del Rio Sanitarium, Inc. (*fka* Del Rio Health-care, Inc.).

None of the petitioners has a parent company or publicly held company owning 10 percent or more of its stock.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California was issued on September 16, 2002, and is reported at 225 F. Supp. 2d 1199 (Pet. App. 140a-149a).

The first panel opinion of the United States Court of Appeals for the Ninth Circuit was issued on April 20, 2004, and is reported at 364 F.3d 1154 (Pet. App. 114a-139a). The Ninth Circuit's order granting rehearing and withdrawing the first opinion was issued on May 13, 2005, and is reported at 408 F.3d 590 (Pet. App. 157a-158a).

The second panel opinion of the Ninth Circuit was issued on September 6, 2005, and is reported at 422 F.3d 973 (Pet. App. 58a-113a). The Ninth Circuit's order granting rehearing *en banc* was issued on January 17, 2006, and is reported at 435 F.3d 999 (Pet. App. 155a-156a); its order withdrawing the second panel opinion was issued on February 9, 2006, and is reported at 437 F.3d 890 (Pet. App. 153a-154a).

The *en banc* opinion of the Ninth Circuit was issued on September 21, 2006, and is reported at 463 F.3d 1076 (Pet. App. 1a-57a). On November 20, 2006, the Ninth Circuit entered an order staying its mandate pending this Court's disposition of this case. Pet. App. 151a-152a.

JURISDICTION

The *en banc* opinion of the Ninth Circuit was issued on September 21, 2006. Pet. App. 1a-57a. On December 7, 2006, petitioners timely filed an application to extend the time to file a petition for certiorari from December 20, 2006, to January 5,

2007. On December 12, 2006, Justice Kennedy granted the application. The petition for writ of certiorari, filed on January 5, 2007, was granted on November 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions involved are the Supremacy Clause of the United States Constitution, U.S. CONST., art. VI, cl. 2; section 8(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(c); and California Assembly Bill No. 1889 ("AB 1889"), Cal. Gov't Code §§ 16645-16649. Each is reproduced in the appendix to the petition for certiorari. Pet. App. 159a-167a.

STATEMENT

A. Background

In response to union lobbying efforts, California enacted AB 1889 to forbid employers receiving state funds of virtually every type, including state grant and program funds, from using those funds to "assist, promote, or deter union organizing."

1. The National Labor Relations Act

The NLRA, 29 U.S.C. §§ 151-169, was enacted in 1935 to federalize and bring uniformity to labor-management relations. *See Amalgamated Ass'n of State Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 286 (1971) (the NLRA is "a comprehensive national labor law . . . for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces"). It is designed "to obtain uniform application of its substantive rules and to avoid the

diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (internal quotation marks omitted). Although the NLRA contains no express preemption provision, "[i]t is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

Employees have the right under the NLRA to "join" or to "refrain" from joining a union. 29 U.S.C. § 157. To become an exclusive collective bargaining representative, a union must be supported by a majority of employees in an appropriate bargaining unit. This is typically shown through a secret-ballot election overseen by the National Labor Relations Board ("NLRB"). *Id.* § 159. The campaigns preceding these representation elections often are vigorously contested, with employees being inundated with union arguments for, and employer arguments against, unionization. *See generally Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58 (1966).

Labor and management "proceed from contrary and, to an extent, antagonistic, viewpoints and concepts of self-interest," *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 488 (1960), and employers rarely support the unionization of their employees, *e.g.*, J.A. 158. When faced with a union organizing campaign, employers often hire legal counsel to advise them about their rights and obligations under the NLRA. J.A. 132, 162-63. Before casting votes for or against union representation, employees learn of their employers' positions from supervisors,

managers, or consultants, as well as through pamphlets and other literature provided at the workplace. J.A. 132, 158, 162-63.

When Congress amended the NLRA in 1947, it added section 8(c), which provides, in pertinent part, that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This Court has stated that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62.

2. Card-Check and Neutrality Agreements

In the face of employer campaigns opposing unionization preceding NLRB secret-ballot elections, unions recently have pursued various ways to evade that process altogether. One tack has been to negotiate with employers to agree to union recognition based solely upon "authorization cards signed by a majority of the employees in an appropriate bargaining unit." Debra Charis, *Union Neutrality Law or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law Section 211-A*, 14 J.L. & POL'Y 779, 785 (2006). Another, often used in conjunction with the first, has been to induce employers to agree to remain neutral throughout the union's organizing campaign, often by imposing "a 'gag order' on employer communication to employees about its views on unionization." *Id.*

As NLRB General Counsel Fred Feinstein noted in 1999, at the end of his tenure, "unions have begun to make greater efforts to obtain 'neutrality agreements'

during organizing campaigns" in order to "facilitate success in organizing." J.A. 303-04. In these neutrality agreements, Mr. Feinstein added, unions often seek to have employers "refrain from exercising their § 8(c) right to express their views about unionization." J.A. 304. A study produced that same year for the George Meany Center for Labor Studies similarly observes that "[a] major tactic used in recent years by unions to counter employer opposition to union organizing is the negotiation of agreements with management to remain neutral in certification elections . . . or to recognize the union based solely on the presentation of sufficient number of signed membership cards." J.A. 318. The authors of that report concluded that such agreements have "produced significant organizing successes." J.A. 315.

These card-check and neutrality agreements, however, depend upon the voluntary consent of employers, which often is not forthcoming. That reality has pushed unions to "lobby[] for legislation that encourages or mandates employer neutrality at the state and local levels." *See* Charish, *supra*, at 787. This case involves one example of such legislation, AB 1889, which was drafted and sponsored by intervenor California Labor Federation, AFL-CIO. J.A. 306; John Logan, *Innovations in State and Local Labor Legislation*, in 3 THE STATE OF CALIFORNIA LABOR 159 n.6 (2003) ("THE STATE OF CALIFORNIA LABOR").

3. California Assembly Bill No. 1889

a. Prohibitions and Exceptions

Signed into law by California's then-Governor Gray Davis in 2000, the preamble to AB 1889 states that "[i]t is the policy of the state not to interfere with an

employee's choice about whether to join or to be represented by a labor union" and that "[i]t is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." Cal. Stats. 2000, Ch. 872, § 1.

Employers subject to AB 1889 include those receiving either a state "grant," Cal. Gov't Code § 16645.2, or over $10,000 from a "state program," *id.* § 16645.7. AB 1889 forbids such employers from using those funds "to assist, promote, or deter union organizing." *Id.* §§ 16645.2, 16645.7. This prohibition is defined to encompass "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or] [w]hether to become a member of any labor organization," *id.* § 16645(a). This proscription applies to "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." *Id.* § 16646(a).

AB 1889 also precludes reimbursements under state contracts to employers for any unionization activities, Cal. Gov't Code § 16645.1(a); prohibits employers from speaking to employees working on state contracts about union organizing, *id.* § 16645.3(a); imposes a spending ban with respect to union-related speech on employers with state contracts of over $50,000, *id.* § 16645.4(a); and bars

employers from using certain state property to meet with employees about union formation, *id.* § 16645.5(a).

There are significant exceptions to AB 1889's spending ban. Covered employers are free under AB 1889 to use "state funds" to enter into a "voluntary recognition agreement" with a union (*e.g.*, a card-check and neutrality agreement), thereby allowing that union to bargain collectively on behalf of the employer's workforce without having to win an NLRB secret-ballot election. Cal. Gov't Code § 16647(d). In addition, expenditures may be made to allow a union "access to the employer's facilities or property." *See id.* § 16647(b). AB 1889 also permits covered employers to use state funds in connection with expenses related to grievance handling; negotiating or administering a collective bargaining agreement; or performing an activity required by law or a collective bargaining agreement. *Id.* § 16647(a), (c).

b. Regulatory Requirements

AB 1889 requires covered employers to adhere to a number of regulatory requirements:

Certifications. All covered employers must provide a certification that they will abide by AB 1889's spending prohibitions. Cal. Gov't Code §§ 16645.2(c), 16645.7(b).

Segregated Accounting Systems. In addition, employers must create separate accounts for funds traceable to a state grant or program and implement special accounting procedures to trace all expenditures related to union organizing. That is so because if employers make an expenditure relating to union organizing from an account with commingled funds, AB 1889 presumes that "state funds" have

been (illegally) used on a *pro rata* basis. Cal. Gov't Code § 16646(b).

Employee Salaries. Employers must ensure that employees who spend any portion of their work time on proscribed unionization matters are paid for such time with funds that cannot be traced to "state funds" in order to comply with AB 1889's prohibition with respect to employee salaries. Cal. Gov't Code § 16646(a).

Recordkeeping and Disclosure. Employers must maintain records "sufficient" to show that no "state funds" were used to assist, promote, or deter union organizing, and employers must provide these records to the California Attorney General upon request. Cal. Gov't Code §§ 16645.2(c), 16645.7(c).

c. Private Lawsuits

AB 1889 subjects employers to suit by the California Attorney General or "any state taxpayer," including a union involved in an ongoing effort to organize an employer's workforce. Cal. Gov't Code § 16645.8(a). In addition to injunctive and other equitable relief, a court may award treble damages—*i.e.*, disgorgement plus a "civil penalty" of twice that amount. *Id.* §§ 16645.2(d), 16645.7(d), 16645.8(a). Although any award of damages goes to the State, a prevailing private plaintiff can recover attorney's fees and costs. *Id.* § 16645.8(d). AB 1889 does not provide for attorney's fees for a prevailing employer.

B. Statement of the Case

1. District Court Proceedings

Petitioners filed this action in 2002 in the Central District of California arguing, among other things, that AB 1889 is preempted by the NLRA and seeking

declaratory and injunctive relief. J.A. 94-127. Respondents California Department of Health Services and individual California officials were named in the complaint (J.A. 94); respondents California Labor Federation, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations intervened (J.A. 63-64).

On cross-motions for summary judgment, the district court entered partial final judgment in favor of petitioners declaring sections 16645.2 and 16645.7 of the California Government Code preempted under the *Machinists* doctrine, which preempts state regulation of conduct that Congress intended to remain unregulated. *See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n,* 427 U.S. 132, 139 (1976) ("*Machinists*"). The district court determined that AB 1889 "regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a; *see also* J.A. 349 (final judgment declaring disputed sections "to be invalid as applied to employers covered by the National Labor Relations Act").

2. Ninth Circuit Decisions

The Ninth Circuit issued three opinions in this case: two panel opinions holding that the contested provisions of AB 1889 were preempted by the NLRA, and an *en banc* opinion holding that they were not.

First panel opinion. The first Ninth Circuit opinion, authored by Judge Fisher for a unanimous court, held that AB 1889 was preempted under *Machinists*. The court, explaining that "open and robust advocacy by both employers and employees

must exist in order for the NLRA collective bargaining process to succeed," held AB 1889 preempted because it "directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process." Pet. App. 127a.

Second panel opinion. The Ninth Circuit panel granted rehearing and withdrew its first opinion. The second opinion, written by Judge Beezer, held that AB 1889 was preempted under *Machinists* as well as the *Garmon* doctrine, which preempts state regulation of activity that is protected, prohibited, or arguably protected or prohibited by the NLRA. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241 (1959) ("*Garmon*"). The court held that "by discouraging employers from exercising their protected speech rights," AB 1889 "operates to significantly empower labor unions as against employers" and "runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the [NLRA]." Pet. App. 81a. Judge Fisher, author of the first opinion, dissented from the second opinion and would have remanded to allow the district court to consider preemption of several of AB 1889's enforcement provisions, which he stated "appear to have an impermissibly intrusive effect on the NLRA's balance . . . between employer and employee." Pet. App. 110a.

En banc *opinion.* The Ninth Circuit granted rehearing *en banc* and withdrew its second opinion. Over the dissent of three judges, the *en banc* court, in an opinion by Judge Fisher, held that AB 1889 was not preempted by the NLRA in any respect. The *en*

banc court rejected respondents' argument that AB 1889 escapes preemption because California in enacting it was not acting as a regulator, but rather as a proprietor (or "market participant"). The court held that "California's condition on the use of its funds constitutes 'regulation[],'" Pet. App. 7a, because "[t]he statute's scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal," Pet. App. 12a. It nonetheless determined that AB 1889 was not preempted under either *Machinists* or *Garmon*.

The *en banc* majority held that *Machinists* was inapplicable because AB 1889 involves the use of state funds, an activity which "by definition [is] not controlled by the free play of economic forces." Pet. App. 17a. It determined, in any event, that "an employer has and retains the freedom to spend its own funds however it wishes," and that AB 1889's effect on noncoercive employer speech is therefore "indirect and incidental." Pet. App. 17a & 18a n.10. It added that *Machinists* applies only to "activity left free from all regulation," and concluded that the NLRB's "extensive regulation of organizing activities demonstrates that *organizing*—and employer speech in the context of organizing—is not such a zone." Pet. App. 19a (emphasis in original).

Garmon did not apply, the Ninth Circuit held, because noncoercive employer speech is neither actually nor arguably protected by the NLRA. It held that section 8(c) of the NLRA "does not grant employers speech rights" but "simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a (emphasis in

original). Even were noncoercive employer speech protected under the NLRA, the *en banc* court concluded that AB 1889, as an exercise of the State's spending power, falls within an exception to *Garmon* preemption for state regulation of conduct that involves "'interests so deeply rooted in local feeling and responsibility that . . . we [cannot] infer that Congress ha[s] deprived the States of the power to act.'" Pet. App. 30a (quoting *Garmon*, 359 U.S. at 243; brackets in original).

In so holding, the Ninth Circuit expressly rejected the views of the NLRB, which, as *amicus*, argued that AB 1889 is preempted under both *Machinists* and *Garmon*. The NLRB explained that "the federal policy, expressed in NLRA Section 8(c), [is] to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." NLRB Amicus Brief at 6, *Chamber of Commerce v. Lockyer* (9th Cir. Nos. 03-55166, 03-55169) (internal quotation marks omitted), *available at* 2003 WL 22330725. The NLRB argued that AB 1889 should be preempted because it "represents California's labor policy-driven decision to use state spending power to pressure private employers to conform to the state model that conflicts with the federal model." *Id.* at 15.

Judge Beezer, joined by Judges Kleinfeld and Callahan, dissented. The dissent, reiterating several of the points made in the second panel decision, concluded that "regulation that specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds." Pet. App. 51a (Beezer, J., dissenting).

SUMMARY OF ARGUMENT

AB 1889 is preempted because it regulates speech that Congress specifically determined should be unregulated. The NLRA protects and encourages noncoercive employer speech about union organizing so that employees may make an informed decision in exercising their NLRA right to join or refrain from joining a union. California, however, takes a different view: Positing that employer speech opposing union organizing efforts "interferes" with employee choice, the State has sought to stamp out such speech through a sweeping exercise of its spending power.

It is indisputable that had California sought to achieve its conflicting labor policy by directly penalizing noncoercive employer speech, such a law would be preempted. AB 1889 does not evade preemption simply because it penalizes such speech through the spending power. It is well established that a state may not leverage public money in a manner that imposes burdens that are inconsistent with the NLRA. Where, as here, a state's regulatory objective conflicts with federal policy, the means by which the state has regulated are irrelevant. Only where a state is *not* pursuing a regulatory goal, but rather is acting as a typical "private market participant" pursuing "purely proprietary interests," do its spending actions escape preemption. But it is patent—as all 15 judges on the *en banc* court agreed—that AB 1889 does not serve any such proprietary or fiscal interest. Rather, drafted and sponsored by intervenor California Labor Federation, AFL-CIO, AB 1889 is designed to further California's

labor policy of silencing allegedly "interfering" employer speech about unionization.

Agreeing with all of this, the Ninth Circuit conceded that AB 1889 would be preempted if it made employer silence on unionization a condition for the *receipt* of state funds. But it determined that the statute survived preemption because it "only" prohibited employers from *using* state funds for the federally-approved speech. The court below thought this receipt/use distinction significant because restrictions on using public funds are allegedly less onerous than complete funding cut-offs and because such restrictions have sometimes been upheld against First Amendment challenge. Neither reason makes sense.

A spending restriction need not be the *most* burdensome option possible to be preempted, and it is undisputed (and indisputable) that AB 1889 imposes real burdens on noncoercive employer speech. For the hundreds of employers in California who receive all of their revenue from the State, including Medi-Cal providers, AB 1889 imposes a complete ban on union-related speech. Such employers are forced either to engage in costly revamping of their businesses or forego their explicit NLRA right to speak. For those employers with other sources of revenue, AB 1889 imposes burdensome regulatory requirements, especially the creation of segregated accounts, which may be enforced by unions in private lawsuits for treble damages and attorney's fees. The costs and risks imposed by AB 1889 undeniably chill the employer speech that Congress and the NLRB deem essential to informed employee decision-making

about union organizing, a labor policy that this Court has repeatedly recognized and credited.

Because it is inconsistent with the NLRA, AB 1889's purported consistency with the First Amendment is beside the point. This Court's First Amendment cases, furthermore, confirm that AB 1889 imposes cognizable burdens on speech that are unsupported by any legitimate state interest. Whatever labor policies California might pursue in the absence of congressional action, it cannot use its spending power to strike a different balance than that established in the NLRA. Any other result would allow for the balkanization of labor law in the United States, with states free to pursue their own idiosyncratic labor policy goals, either in support of or in opposition to unions, simply by attaching conditions to the trillion dollars they spend annually.

ARGUMENT

I. AB 1889 IS A REGULATORY ENACTMENT INTENDED TO IMPLEMENT A CALIFORNIA LABOR POLICY THAT CONFLICTS WITH FEDERAL LAW

AB 1889 is preempted because it regulates noncoercive employer speech that Congress specifically intended to protect by leaving it free from governmental regulation. In AB 1889, California is using its spending power to foist its own labor policy of employer silence on union organizing, not to further any proprietary or fiscal interest. That regulatory purpose is irreconcilable with an employer's express NLRA right to engage in noncoercive speech, and AB 1889, in practice, undeniably interferes with the exercise of that right. Under settled preemption principles, California's

backdoor effort to alter supreme federal labor policy cannot stand.

A. A State Cannot Regulate Activities Which Congress Has Determined Should Be Unregulated

The NLRA broadly preempts states laws that "'frustrate the federal scheme.'" *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985)); *accord Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986) ("*Golden State I*") (the "'crucial inquiry regarding preemption'" is whether the state law "'would frustrate effective implementation of the Act's processes'") (quoting *Machinists*, 427 U.S. at 147-48); *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 542 (1945) (state law preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted).

The NLRA thus "protects against state interference with policies implicated by the structure of the Act itself, by preempting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metro. Life Ins.*, 471 U.S. at 749. By prohibiting "state and municipal regulation of areas that have been left to be controlled by the free play of economic forces," preemption "preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993) ("*Boston Harbor*") (internal quotation marks

omitted); *see also Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 260 (1964) (states may "not upset the balance of power between labor and management expressed in our national labor policy"); *Golden State I*, 475 U.S. at 614 ("Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance between the uncontrolled power of management and labor to further their respective interests.") (internal quotation marks omitted).

Consequently, "an authoritative federal determination that [an] area is best left *un*regulated" has "as much preemptive force as a decision *to* regulate." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (citing *Nash-Finch*, 404 U.S. at 144; emphasis in original); *accord Garner v. Teamsters, Chauffeurs & Helpers Union*, 346 U.S. 485, 500 (1953) (state impingement "on [an] area of labor combat designed to be free" is "an obstruction of federal policy"). These "settled preemption principle[s]," applicable to all state laws, have their "greatest force" with respect to a law like AB 1889, which "regulat[es] the relations between employees, their unions and their employer." *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 533 (1979) (plurality op.) (internal quotation marks omitted).

In *Machinists*, this Court held that Wisconsin could not regulate a union's partial strike activity during collective bargaining negotiations because Congress intended such activity to be free from all regulation. *See* 427 U.S. at 148. As *Machinists* explains:

> An appreciation of the true character of the national labor relation policy expressed in the NLRA . . . indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.

Id. at 141 n.4 (internal quotation marks omitted).

More specifically, *Machinists* holds that the "failure of Congress to prohibit certain conduct warrants a negative inference that it was deemed proper, indeed desirable at least, to be left for the free play of contending economic forces." 427 U.S. at 141 n.4 (internal quotation marks and alterations omitted). Thus, when a state "outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available." *Id.* (internal quotation marks omitted). So preempting state regulation of activities that are immunized from federal regulation, such as noncoercive employer speech, serves the basic "purpose of the Act, [which] was to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Nash-Finch*, 404 U.S. at 144 (internal quotation marks omitted).

B. The NLRA Makes Clear That Noncoercive Speech Should Be Unregulated

There can be no question that noncoercive employer (and union) speech about unionization is an area that the NLRA has made clear should be unregulated and left to the "'uncontrolled power of management and labor to further their respective interests.'" *Machinists*, 427 U.S. at 146 (quoting *Morton*, 377 U.S. at 258-59).

In 1947, the Taft-Hartley Act amended the NLRA to include section 8(c), which prevents "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . if such expression contains no threat of reprisal or force or promise of benefit," from being considered an unfair labor practice. 29 U.S.C. § 158(c); *accord* H.R. Conf. Rep. No. 80-510, at 45 (1947) ("The purpose [of section 8(c)] is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.").

As this Court has repeatedly recognized, Congress' insertion of explicit protection for noncoercive employer speech in section 8(c) "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62; *accord NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (an employer's "right to [engage in noncoercive anti-union solicitation] is protected by the so-called 'employer free speech' provision of § 8(c) of the Act"). "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or

force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Thus, section 8(c) enables employers to speak freely about unionization, just as unions may. Indeed, section 8(c) rectified prior NLRB decisions that "denied employers the opportunity to answer the attacks which often accompany organizing campaigns, and forbade them even to acquaint their workers with opinions in which they honestly believed." Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 15 (1947). So leveling the playing field not only protects employers' right to free speech, as importantly it also vindicates employees' section 7 right to make an informed decision about whether to select an exclusive bargaining representative. *See Gissel*, 395 U.S. at 617-18; *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938).

In short, "the guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available." *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967); *accord* JULIUS G. GETMAN, *ET AL.*, LABOR MANAGEMENT RELATIONS AND THE LAW 48 (2d ed. 1999) ("LABOR MANAGEMENT RELATIONS") (explaining that employees "must be given a chance to learn about the pros and cons of unionism" since the NLRA's "basic policy . . . is that employees should be free to make informed and carefully reasoned choice"). This Court has accordingly construed section 8(c) "against the background of a profound commitment

to the principle that debate should be uninhibited, robust, and wide-open." *Linn*, 383 U.S. at 62 (internal quotation marks and alterations omitted).

The NLRB—upon which "Congress conferred the authority to develop and apply fundamental national labor policy," *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978)—has long recognized "the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a noncoercive manner." *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964) (internal quotation marks omitted). It has accordingly held that "both parties to a labor dispute have the equal right to disseminate their point of view." *Livingston Shirt Corp.*, 107 N.L.R.B. 109, 406 (1953).

Indeed, given section 8(c), Congress' intent to preclude all government regulation of noncoercive employer speech here is even more obvious than its intent to protect the partial strikes at issue in *Machinists*. Here, Congress "focused on the problems presented" by not protecting noncoercive speech and "enacted specific legislation" which amended the NLRA to deal "with this subject matter." *Machinists*, 427 U.S. at 157 (Stevens, J., dissenting). In *Machinists*, in contrast, there was no specific NLRA provision permitting unions to engage in the self-help of partial strikes; indeed, there was "no legislative expression" of any kind suggesting "Congress' intent to leave partial strike activity wholly unregulated." *Id.*; *see also Livadas v. Bradshaw*, 512 U.S. 107, 118 n.11 (1994) ("The right to self-help upheld in *Machinists*" was "*implicit* in the structure of the Act") (emphasis added).

Thus, it is quite clear that any state effort to directly prohibit or penalize noncoercive employer speech is preempted. Such laws govern speech that Congress plainly intended to be unregulated and thereby disrupt the balance Congress struck between labor and management. They frustrate the NLRA's purpose of encouraging such speech, in order to provide a level playing field that enhances employees' informed decision-making.[1]

Similarly, they are preempted under *Garmon* and its progeny because they intrude on the NLRB's

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[1] The Ninth Circuit's extraordinary assertion that *noncoercive* employer speech in the organizing context was not intended to be "free from all regulation" under *Machinists* because the NLRB can regulate *coercive* employer speech that is "prejudicial to a fair election" has it precisely backwards. Pet. App. 19a-20a. The fact that Congress chose to prohibit, in the organizing context and elsewhere, *only* speech containing a "threat of reprisal" or otherwise unfairly prejudicing elections *confirms* that noncoercive speech is one of the "peaceful methods" available to an employer to deter unionization "free from government inference." *Machinists*, 427 U.S. at 154. By analogy, the fact that picketing designed to "coerc[e] employees" is an unfair labor practice clearly implies that "other [peaceful] picketing is to be free" from state regulation—not, as the court below would have it, that picketing is a "zone of activity" that may be regulated. *Garner*, 346 U.S. at 499-500; *see also Morton*, 377 U.S. at 258, 261 (federal law's prohibition of only "certain secondary boycott activities" preempts an Ohio law that penalizes "peaceful union secondary activities"). Indeed, under the Ninth Circuit's reasoning, the fact that the First Amendment permits regulation of "fighting words" (*see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) means that the Amendment did not intend to make peaceful political speech a "zone of activity" free from government regulation. Thus, the Ninth Circuit's conclusion is at war with logic as well as precedent.

primary jurisdiction to determine whether an employer's speech is noncoercive (and thus "arguably protected") or coercive (and thus "arguably prohibited"), by prophylactically prohibiting all such speech. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 n.7 (1989) (*Garmon* preemption "avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB.") (internal quotation marks and citation omitted). "[B]ecause the protection afforded by section 8(c) is to leave employer speech largely unregulated, in a case involving section 8(c), the *Garmon* doctrine and the *Machinists* doctrine actually tend toward the same point." *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 107 (2d Cir. 2006).[2]

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[2] The *en banc* majority reasoned that noncoercive speech is not "protected" by the NLRA because section 8(c) simply immunizes an employer from liability for engaging in such speech, rather than creating a "right" for employers analogous to employees' rights under section 7 of the Act. Pet. App. 22a-23a. But, of course, the NLRA does not "protect" an *employer's* freedoms by granting them any "rights" relative to their employees. Rather, employer freedoms, such as the freedom to engage in noncoercive speech, are "protected" by the NLRA by preventing government interference with that freedom, just as the First Amendment "protects" citizens' speech by preventing "Congress" from interfering with it. *See Healthcare Ass'n*, 471 F.3d at 99.

C. States May Not Interfere With Federal Labor Policy Through The Exercise Of Their Spending Power

The only remaining question, then, is whether AB 1889 evades preemption because its regulation and penalization of noncoercive employer speech is done through the spending power. The answer is plainly no. Where, as is concededly the case here, a state seeks to advance a regulatory interest in labor policy, rather than a "purely proprietary interest" of a private "market participant," the fact that the regulatory interest is pursued through the spending power, rather than the police power, is irrelevant to the preemption analysis. *Boston Harbor*, 507 U.S. at 229, 231; *see also Gould*, 475 U.S. at 291; Pet. App. 11a.

The dispositive NLRA preemption question in this context is whether the state is imposing a condition on spending or similar benefits for the regulatory purpose of deterring activity that the Act authorizes, or is simply "managing its own property [by] pursu[ing] its purely proprietary interest . . . where analogous private conduct would be permitted." *Boston Harbor*, 507 U.S. at 231. The former use of the spending power is preempted, while the latter is not.

Where, as here, a state's regulatory objective conflicts with federal policy, it is blackletter law that the means by which the state has regulated are irrelevant—the law is still preempted. "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Garmon*, 359 U.S. at 243. In *Gould*, this Court

unanimously held preempted a Wisconsin statute debarring the State from contracting with any firm found to have violated the NLRA on three separate occasions because it imposed a "supplemental sanction" that conflicted with the NLRA's remedial regime. 475 U.S. at 288. Wisconsin attempted to defend the measure as an exercise of its spending power, but this Court found that the State was "not functioning as a private purchaser of services" because "the point of the statute is to deter labor law violations": "[F]or all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 287, 289 (internal quotation marks and citation omitted). Given its conflicting regulatory purpose, the Court held that Wisconsin's debarment law could not be saved simply because it was an "exercise[] of the spending power." *Id.* at 290.

In short, the fact that a state seeks to interfere with NLRA-authorized actions through its "spending power rather than its police power" is a "distinction without a difference." *Gould*, 475 U.S. at 287. Rather, the "'proper focus'" is on "'the conduct being regulated,'" not the method of regulation; it would thus "make little sense" to allow otherwise improper state interference with the NLRA's uniform scheme "simply because it operates through state purchasing decisions." *Id.* at 289 (quoting *Lockridge*, 403 U.S. at 292).

Thus, this Court has found governmental action preempted in a wide variety of contexts where the state policy was implemented through withholding of financial or other benefits, rather than through the police power. As the Court, again unanimously, explained in *Livadas*, a "state rule predicating

benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." 512 U.S. at 116. Thus, the Court held that California's decision to not award three days' pay to an employee that she was otherwise entitled to under state law, because she was subject to a collective bargaining agreement requiring arbitration, was preempted. California's decision to provide the employee with an "unappetizing choice" between foregoing a statutory right or enjoying the benefits of a collective bargaining agreement would, "if not preempted, 'defeat or handicap a national objective by . . . withdrawing state benefits . . . simply because an employee engages in conduct protected and encouraged by the NLRA.'" *Id.* at 116-17 (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 239 (1967)). In *Nash*, the Court had earlier held preempted a Florida law that denied unemployment insurance to those employees who filed unfair labor practice charges against their employers. *See* 389 U.S. at 239.

Similarly, Los Angeles' decision to condition a taxicab franchise renewal on the company's settlement of a labor dispute was held preempted. *Golden State I*, 475 U.S. at 616. The City's condition "thwarted" the bargaining process that the NLRA "leaves largely to the parties," *id.* at 615, impermissibly restricting the company's "ability to resist a strike," *id.* at 618, regardless "whether the City's action favors one side or the other" in the dispute, *id.* at 619. The Court rejected the City's argument that it was "not regulating labor" because the interference came in the form of the "traditional municipal function [of] issuing taxicab franchises,"

noting that *Gould* had rejected a "similar argument . . . that a State's spending decisions are not subject to preemption." *Id.* at 618. Outside the labor law context, this Court has reaffirmed that "the fact that the State 'ha[s] chosen to use its spending power rather than its police power' d[oes] not reduce the potential for conflict with the federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.7 (2000) (quoting *Gould*, 475 U.S. at 288-89).

These precedents instruct that it is impermissible for a state to leverage public money or other benefits to impose burdens that are inconsistent with, or go beyond, the proscriptions of the NLRA. On the other hand, if a state is not pursuing a regulatory interest, but simply acting as a "market participant" pursuing "purely proprietary interests" that would be pursued by private actors, its actions are not preempted simply because those interests affect labor-management relations. *Boston Harbor*, 507 U.S. at 229, 231.

In *Boston Harbor*, this Court, quoting then-Chief Judge Breyer, upheld Massachusetts' decision to require all bidders on a state project to agree to enter into prehire agreements expressly authorized by the NLRA, because "it was acting in the role of purchaser of construction services, act[ing] just like a private contractor would act, and condition[ing] its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find." *Id.* at 233 (internal quotation marks and citations omitted). There is little concern with interference with federal law, this Court held, "when the State acts as a market participant *with no interest in setting policy*." *Id.* at 230 (emphasis

added); *accord id.* at 231 (a state has leeway "manag[ing] its own property when it pursues its *purely proprietary interests*, and where analogous private conduct would be permitted") (emphasis added). Because Massachusetts' bid requirement was "specifically tailored to one particular job" and was designed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," the Court determined that it was "acting as a proprietor rather than regulator." *Id.* at 228. The Court reasoned that because "a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same." *Id.* at 231 (emphasis in original).

II. AB 1889 FURTHERS CALIFORNIA'S LABOR POLICY, NOT ANY PROPRIETARY OR FISCAL INTEREST

Here, the *en banc* court unanimously concluded that AB 1889 is "regulatory and . . . not protected by the market participant exception." Pet. App. 11a; *see also* Pet. App. 51a (Beezer, J., dissenting); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1048 (9th Cir. 2007) (noting that "[AB 1889] quite plainly functioned as regulatory rather than propriety action"). It so found because the statutory language "makes clear that the legislation's purpose is to prevent 'state funds and facilities' from being used to subsidize an employer's attempt to influence an employee's choice about whether to join a union" and "does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of

private parties." Pet. App. 11a. It also noted that the statute's "broad scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal." Pet. App. 12a. The Ninth Circuit's unanimous interpretation of AB 1889 as serving only a regulatory interest in labor policy, rather than any proprietary interest, is compelled by the statute's plain language and overall scheme.

The statute does not contain any hint that any proprietary or fiscal interest is being furthered. To the contrary, the plain text of the statute unequivocally states that when an employer "deter[s] union organizing," this "*interfere[s]* with an employee's choice about whether to join or be represented by a labor union" and since such interference is contrary to "the *policy* of the state," AB 1889's spending restriction is imposed. Cal. Stats. 2000, Ch. 872, § 1 (emphasis added). Thus, California's labor policy is that employers' discussion of unionization somehow interferes with employee choice, so the State seeks to deter such harmful speech. In contrast, federal labor policy is that presenting *both* sides of an "uninhibited, robust debate" about unionization *enhances* employee choice by facilitating fully-informed decision-making. *Linn*, 383 U.S. at 62 (internal quotation marks and citation omitted). In short, on its face, AB 1889 indisputably evinces a labor regulatory policy—one diametrically opposed to that of the NLRA. This is hardly surprising since AB 1889 was sponsored by Assemblyman Gil Cedillo, a former Service Employees International Union ("SEIU") officer; was authored by the counsel of record for intervenor California Labor Federation, AFL-CIO; and passed

on a strict party line vote. *See* J.A. 306; THE STATE OF CALIFORNIA LABOR at 159 n.6, 166.[3]

California is plainly not "neutral" on the question of noncoercive employer speech—it is firmly opposed to it. Due to this opposition, California seeks to render publicly-funded *employers* "neutral" on unionization by using its spending power to keep them out of this debate. *See Machinists*, 427 U.S. at 156 n.* (Powell, J., concurring) ("State laws should not be regarded as neutral if they reflect an accommodation of the special interest of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining."). The State is therefore undeniably using its spending power to regulate employer speech to induce "employer neutrality" (Pet. App. 17a) so as to favor labor in the debate over unionization, not because it believes that employer speech costs California money or diminishes the efficacy of publicly-funded services.

The statute's other provisions underscore that California has no concern, fiscal or otherwise, with "subsidizing" discussions about unionization, but is concerned only with *employers* discussing the issue. For example, AB 1889 authorizes and encourages

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[3] The unions' efforts to enact AB 1889 are reminiscent of the effort by the employer in *Machinists* to enjoin its union from refusing to work overtime: "The employer in this case invoked the Wisconsin law because it was unable to overcome the Union tactic with its own economic self-help means." 427 U.S. at 148. But *Machinists* instructs that whatever the NLRA-related labor relation difficulties of either employers or unions might be, they "cannot justify state aid contrary to federal law." *Id.* at 149.

using public money to allow a union access to the workplace to discuss the benefits of organized labor. *See* Cal. Gov't Code § 16647(b). But AB 1889 forbids any rebuttal to the union by a supervisor paid with funds derived from the state. *See id.* § 16646(a). Similarly, hiring a consultant to oppose a union attempting to become the exclusive representative under a collective bargaining agreement is prohibited, *see id.*, but paying a consultant to "negotiat[e]" or "administer[]" such a bargaining agreement is encouraged, *id.* § 16647(a). And, perhaps most tellingly, employer expenditures designed to deter employees from selecting a union are forbidden, *see id.* § 16646(a), while expenditures to voluntarily recognize a union are encouraged, *see id.* § 16647(d).[4]

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[4] Since these exemptions allow any employer effort to "assist" or "promote" unionization, they render AB 1889's supposed prohibition of such pro-union speech meaningless—all that is left is the prohibition against speech to "*deter* union organizing." Cal. Gov't Code §§ 16645.2, 16645.7. Of course, this fig leaf of neutrality is otherwise meaningless because employers are rarely inclined to *promote* unionization, and certainly not sufficiently inclined that the State needs to affirmatively stop them from doing so. And even if the ban on employer speech did apply to both pro- and anti-union speech, this would still not make AB 1889 "neutral" on noncoercive employer speech or eliminate its conflict with section 8(c). AB 1889 still singles out only *employer* speech for disability and is thus hardly neutral. Section 8(c), moreover, protects the "expressing of *any* views" about unionization, favorable or unfavorable, so AB 1889's deterrence of such speech still clashes with that federal labor provision. 29 U.S.C. § 158(c). Presumably for all of these reasons, the Ninth Circuit did not attach any significance to that part of AB 1889 which references "assist[ing]" or "promot[ing]" unionization.

The statute's authorization of public funds to facilitate, but not to discourage, unionization belies any notion that AB 1889 reflects any belief that using state-derived funds in connection with unionization somehow negatively affects California's treasury or the effective delivery of public services. Rather, this viewpoint-based discrimination vividly confirms that the perceived evil being addressed is federally-authorized employer speech, not any sort of proprietary issues that would motivate a private actor.

Equally revealing is that AB 1889 prohibits noncoercive employer speech even where public funds—and thus potential cost savings—are inherently not implicated. That is, section 16645.5 of the California Government Code imposes a civil penalty on concessioners or other employers "conducting business on state *property*" if they "deter union organizing" on "state property." This obviously cannot save California any money or produce any efficiencies because the rent paid by concessioners is not affected by their union speech and concessioners are not using any state money to run their businesses. This provision thus further confirms that AB 1889 is indifferent to financial concerns, but is simply using state benefits as a weapon to coerce employer silence.

III. AB 1889 IMPERMISSIBLY BURDENS SPEECH THAT THE NLRA PROTECTS

The foregoing clearly establishes that a labor policy "purpose" is the only one that can "credibly be ascribed" to AB 1889 and the State is not acting as a private market participant. *Gould*, 475 U.S. at 287. That being so, AB 1889 is clearly preempted under the well-established principle that

use of the spending power for a labor policy purpose is impermissible regulation. The Ninth Circuit, as noted, fully agreed that the "market participant" exception was inapplicable and, indeed, also agreed that California could not achieve this labor policy goal under *Gould* by making "employer neutrality . . . a condition for the *receipt* of state funds." Pet. App. 17a (emphasis in original); *see also* Respondents' Brief in Opposition 22.

The *en banc* majority nevertheless concluded that California's use of the spending power to achieve its labor policy goal was somehow not preempted because the funding condition only "restrict[s] the *use* of state funds" after they are received by the employer. Pet. App. 17a (emphasis in original). Although its reasoning was quite opaque, the Ninth Circuit apparently thought this distinction dispositive because such "use" restrictions (1) allegedly have some beneficial financial effect; (2) purportedly impose a lesser burden on noncoercive employer speech than would a *Gould*-like funding cut-off; and (3) have sometimes been found to comply with the First Amendment. Pet. App. 18a-19a, 32a-33a. All of these assertions, however, are untrue and/or irrelevant to the preemption analysis.

A. Any Fiscal Effect Of AB 1889 Is Incidental To Its Purpose Of Altering Federal Labor Policy

1. Like California's "late-blooming" effort in *Livadas* to defend the policy there as "animated simply by the frugal desire to conserve the State's money," the California Attorney General's effort here to cobble together a fiscal rationale for AB 1889 does not have "any tether to [the] California law" at issue. 512 U.S. at 127, 129. No amount of clever advocacy

can disguise the fact that AB 1889, on its face, is designed to leverage state money to deter employer speech that the NLRA views as valuable, not to further any fiscal interest in avoiding the waste of public resources. Any legitimate *fiscal* interest in "ensuring that program funds [are] use[d] for the purpose they were given" (Pet. App. 17a) is more than served by the standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses. *See, e.g.*, Cal. Health & Safety Code § 25299.105(b); J.A. 308 ("Nonprofits that receive contracts and/or grants from the state of California are not allowed to use those funds for anything other than the stated purpose of the contract and/or grant."); *accord* 2 C.F.R. § 215.21(b)(3) (grant recipients "shall adequately safeguard all [funds, property, and other assets] and assure that they are used solely for authorized purposes"). If expenditures involving employee relations are permissibly included in program-related expenses chargeable to the State, this reflects the State's fiscal decision that such indirect costs efficiently further programmatic purposes and should be reimbursed. Conversely, if the State generically and neutrally excludes costs relating to employee relations from programs and grants, then the private actors have never *received* any money related to the employer's speech about unionization, so restricting the employer's *use* of public funds for such speech cannot prevent wasteful "subsidization," since that speech was never "subsidized" in the first place. *See Healthcare Ass'n*, 471 F.3d at 104 (a state can accomplish its goals of "mak[ing] sure that [it] does not end up paying labor costs" and "saving money" by "limiting the kind of

costs for which it will reimburse program participants").[5]

For example, a restriction against a health-care provider including unrelated costs (*e.g.*, the cost of a computer consultant) in a reimbursement form requesting $5,000 for performing an appendectomy presumably serves the state's fiscal interest. But the state, having excluded the unrelated cost of the computer consultant from the reimbursement, has no financial interest in telling the health-care provider he cannot *spend* the $5,000 it receives for performing that appendectomy on a computer consultant. The state's $5,000 reimbursement is not increased or affected in any way if that money is spent on a computer consultant; the state is out $5,000, and only $5,000, *regardless* how the money is spent. The same is true of AB 1889's prohibition against *using* state funds to pay a consultant on union organizing.

In short, since the State has achieved its fiscal interest by limiting public monies to whatever activities it deems related to the purpose of the government-funded program, the State has no additional fiscal interest in telling private recipients how to spend the money they fairly received in exchange for providing this public service. The only

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[5] If the private recipient is paid a *fixed price* for a particular service, then the State plainly has no conceivable fiscal interest in how that money is *spent*, since the State's payment remains the same regardless. Even AB 1889 recognizes that such arrangements do not affect the public fisc since it expressly exempts "a fixed-price contract or . . . any other arrangement by which the amount of payment of state funds does not depend on the costs incurred by the state contractor" from the ban on reimbursements. Cal. Gov't Code § 16645.1(d).

purpose of AB 1889, then, is to leverage state-provided funds to create a gratuitous barrier to employers engaging in federally-approved speech.[6]

2. The absence of any fiscal purpose underlying a spending restriction is particularly obvious where, as here, it singles out a particular activity to prohibit but places no similar restriction on activities with similar effects and the restriction has no nexus to the state's programmatic goals. In such circumstances it is crystal clear that the additional, specific restriction is not designed to achieve any economies, but to further a public policy unrelated to cost savings. Thus, for example, a spending restriction on abortion, among all medical procedures related to childbirth, does not reflect any fiscal purpose, even though it has the effect of reducing public outlays, but obviously constitutes a "value judgment favoring childbirth

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[6] In lobbying for AB 1889, intervenor California Labor Federation, AFL-CIO, argued that the bill would "ensure that state funds are not wasted on expensive anti-worker campaigns." J.A. 312. Picking up on this notion, the *en banc* majority hypothesized a grant where hospitals are given money to hire more nurses and theorized that AB 1889 might prevent the "effectiveness of [this] grant [from] being diminished by funding a campaign to convince nurses not to unionize." Pet. App. 31a n.18. This cannot be the purpose of AB 1889, however, because, again, general procurement principles prevent the hospital from improperly diverting the funds earmarked for paying nurses to other uses and, more tellingly, because AB 1889 does not seek to "diminish the effectiveness" entailed in a hospital expending funds for a campaign *encouraging* nurses to unionize. Thus, to the extent AB 1889 incorporates the belief that an anti-union campaign "wastes," or "diminishes the effectiveness" of, state expenditures, it is necessarily premised on the labor policy view that noncoercive employer speech is a disruptive interference, not on any fiscal policy.

over abortion," just as AB 1889's singling out of only *employer's* union-related speech reflects the "value judgment" that such speech "interferes" with employee choice. *Maher v. Roe*, 432 U.S. 464, 474 (1977); *cf. Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988) (interest in protecting fiscal integrity of governmental programs "does not mean that Congress can pursue the objective of saving money by discriminating against individuals or groups"). Indeed, no case involving a general funding restriction on a particular activity has suggested that funding riders serve a proprietary, as opposed to policy, function.

The absence of a fiscal purpose is even clearer where, as here, the restriction is attached to *all* monies for *any* purpose, and therefore plainly is not designed to achieve any program-specific effectiveness or cost savings. For example, even if the government may exclude reimbursement for certain types of lawsuits from a legal services program, or abortion reimbursement from a Medicaid program, this does not suggest that it may prohibit law firms from financing such suits with unrelated legal fees from the state or prohibit welfare recipients or public employees from spending "publicly-derived" funds for an abortion. *Cf. Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

Thus, AB 1889 is plainly an impermissible effort at labor regulation under *Gould* even if it could have some indirect fiscal effect. As this Court has frequently emphasized, in "labor preemption cases" the question is not "the reasonableness of state policy," but simply whether an otherwise

"reasonable" policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law. *Livadas*, 512 U.S. at 120. Although "a state legislature has an undoubtedly rational and 'legitimate' interest in raising revenue," a state tax that serves that legitimate goal is nevertheless prohibited if the "power to tax" is improperly used to "destroy" constitutionally protected activity or, as here, to frustrate federal labor policy. *Id.* The same is true of the spending power, which is why the Court has held preempted state actions that frustrate federal labor policy, even though they also advance reasonable fiscal interests unrelated to labor relations and even though they are "neutral" between labor and management.

Thus, in *Golden State I*, the Court found that using the taxicab franchise renewal to induce settlement of a labor dispute was "regulating labor" under *Gould*, 475 U.S. at 618, even though it served the City's obvious non-labor interest in "putting . . . taxis back on the streets," *id.* at 622 (Rehnquist, J., dissenting), and "could easily have been redescribed as following a 'hands off' policy [of] . . . avoid[ing] endorsing either side in the course of a labor dispute," *Livadas*, 512 U.S. at 129. Similarly, in *Nash*, the policy of not paying unemployment compensation to an employee who might receive a duplicative back-pay award if he prevailed on his unfair labor practice charge served Florida's monetary interest of not providing the employee a "windfall" or of avoiding the burden and expense of seeking to "recoup compensation payments made during [the] period covered by [the] back-pay award." 389 U.S. at 239 n.4. This policy was nonetheless preempted even though the

"commission in *Nash* may have understood its policy as expressing neutrality between the parties in a yet-to-be-decided unfair labor practice dispute." *Livadas*, 512 U.S. at 129. And, of course, Wisconsin in *Gould* was not pursuing a policy that was in *conflict* with the NLRA, but was simply *reinforcing* prohibitions of federal labor law through additional sanctions designed "to deter labor law violations and reward fidelity to the law." 475 U.S. at 287 (internal quotation marks and citation omitted).

This case is thus far easier than all of those where the Court has found that the withholding of benefits was preempted, because AB 1889's plain and avowed policy of cutting off funds for noncoercive employer speech is neither "neutral" nor consistent with the NLRA and, "for all practical purposes, ... is tantamount to [labor] regulation." *Gould*, 475 U.S. at 289.[7]

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[7] The *en banc* court cited three *federal* statutes imposing spending restrictions related to union organizing as "'evidence that Congress does not view such a restriction as incompatible with its labor policies.'" Pet. App. 21a (quoting *De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plurality op.)). These provisions, however, mean only that a majority of Congress in the 1990s, in three of the countless number of federal spending programs, imposed funding restrictions affecting employer speech. It cannot plausibly be argued that these *ad hoc* federal funding statutes somehow implicitly repealed, or altered the meaning of, the NLRA. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-190 (1978) (discussing the "cardinal rule" against repeals by implication, which is overcome only where there is "a positive repugnancy" between the two laws or where congressional intent to repeal is "clear and manifest") (internal quotation marks omitted). Nor can these federal laws be read to otherwise somehow condone AB 1889. In stark contrast, the (cont'd...)

B. AB 1889 Interferes With The Federal Scheme By Burdening And Deterring Noncoercive Employer Speech

The Ninth Circuit attached talismanic significance to its bald assertion that AB 1889's prohibition against *using* state-derived funds to engage in union-related speech is less draconian than *denying* funds to organizations who engage in that speech. Pet. App. 17a-18a. But the question is not whether the state has imposed the *maximum possible* spending burden on federally-protected activities, but whether a cognizable burden has been imposed on such activity. It cannot be disputed that AB 1889's funding restriction imposes a real barrier to protected employer speech and, indeed, is in many ways as disruptive of the federal scheme as a straightforward funding cut-off.

As a threshold matter, AB 1889 obviously will have a "real effect," *Livadas*, 512 U.S. at 119, on employer speech opposing unionization. Otherwise, unions would not have lobbied for it and California would have not thought that it would discourage employers

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(...cont'd)

state law at issue in *De Veau* implemented an interstate compact which Congress had to approve, which Congress did approve in the face of arguments that the law "unduly interfered with federal labor policy" and, unusually, with specific reference not only to the compact, but its implementing laws. 363 U.S. at 154. Thus, for all intents and purposes, the law in *De Veau* was a *joint* federal and state enactment and, at a minimum, placed a specific congressional imprimatur on the state law, which these three isolated provisions obviously do not do for AB 1889.

from "interfering" with employee choice. Indeed, the Ninth Circuit expressly found that AB 1889 was "distinct from" a restriction found not to be preempted in a prior case precisely because the restriction here *did* "have some 'real effect' or practical economic impact on the employer." Pet. App. 12a n.6 (citation omitted).

The Ninth Circuit's acknowledgement that the restriction here has some deterrent effect should have ended the inquiry and led to a finding of preemption. Any state labor policy that frustrates or is an obstacle to the integrated federal scheme is preempted. *See* Part I, *supra*. Deterring federally-authorized activity plainly has such an effect. Indeed, there is no reasonable basis for denying that AB 1889 imposes a burden. It prevents using any funds derived from the State to support speech disfavored by the State. The Court has routinely characterized such measures as "substantial restriction[s]," *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001), even where the grantee could engage in the prohibited activity with non-public funds placed in "affiliate organizations," *id.* at 556 (Scalia, J., dissenting).

Of course, for both a *Gould*-like funding cut-off and the "use" restriction here, the *degree* of the burden will depend, as a threshold matter, on how much of the private actor's revenue is derived from the public fisc. If an entity derives a relatively small and easily replaceable amount of funds from the state, then a funding cut-off as in *Gould* will have little effect on the recipient's practices. Conversely, if an entity receives all or virtually all of its revenues from the state, then both the *Gould*-type cut-off and the use

restriction here will operate as a complete ban on the disfavored activity. For example, Petitioner Zilaco, Inc., receives over 90% of its revenue from Medi-Cal, and 500 other identified employers, such as United Cerebral Palsy, receive *all* their revenues from Medi-Cal. J.A. 153, 166, 301. Thus, they simply do not have sufficient non-state funds to engage in noncoercive employer speech. For these entities, then, AB 1889 operates as a total ban on federally-protected speech, no different than an outright prohibition.

Incredibly, the Ninth Circuit's complete answer to this undisputed economic reality was simply to embrace the "long[-]rejected Justice Holmes' . . . dictum" about a policeman's right to talk politics, contending that a state-funding recipient "may have an [NLRA] right to talk [about unions], but he has no . . . right to be a [recipient]." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *see id.* ("[T]he similarities between government employees and government contractors with respect to [free speech rights] are obvious."). Specifically, the Ninth Circuit dismissively asserted that AB 1889's effect on entities without private funds is of no concern because "nothing prevents the employer from raising additional funds from a non-state source." Pet. App. 18a. By the same token, no governmental restriction "prevented" the contractors in *Gould* or the grantees in *Velazquez* from eliminating or ameliorating the harsh effect of those funding restrictions by raising all or some of their funds from private sources. But that truism did not change the fact that the funding restrictions imposed a serious burden on protected activity if the recipient either maintained the *status quo* or if it sought to shift its revenue sources to

private entities, since such a change from its profit-maximizing business plan would impose obvious economic costs. Indeed, the negative economic effect of raising non-state revenues, particularly in an area such as Medi-Cal where private funds are scarce, may well exceed the financial burden imposed by a civil penalty or fine.

The basic point, however, is that the state has no authority to apply this economic pressure (whatever its ultimate scope) by forcing on recipients an "unappetizing choice" between sacrificing their rights under federal labor law or diminishing their fairly-earned state revenues. *Livadas*, 512 U.S. at 117. If the loss of three days' wages in *Livadas* was too "unappetizing" to be forced to swallow, the sacrifice imposed on recipients by the Ninth Circuit is plainly beyond the pale. Indeed, if the raw ability to avoid a regulation's impact through economically counter-productive actions defeated preemption, then *direct* regulation by California would never be preempted because, of course, "nothing prevents" businesses from leaving the State and escaping California's regulatory reach.

Moreover, with respect to recipients who do have sufficient non-state funds to engage in union-related speech, AB 1889 also imposes serious burdens. California's then-Governor Davis recognized this when he vetoed AB 1889's predecessor, Assembly Bill No. 442, because "[t]his legislation has the potential to impose an unreasonable burden on business that they would have to maintain minutely-detailed records to track goods, services and funds received from the State in order to avoid violating the provisions contained therein." J.A. 119. Unlike a

Gould-like cut-off, a "use" restriction like that here has an *ongoing* debilitating effect on the recipient's activities, because it requires the recipient to keep track of "public" funds and ensure that they are not used for the proscribed purpose. Here, if an employer commingles state and other funds, *any* union-related expenditure violates AB 1889 because the statute "presumes" that any such expenditures "derive in part from state funds." Pet. App. 4a-5a (citing Cal. Gov't Code § 16646(b)). Thus, "in order to engage in union-related speech," employers are "required to maintain separate accounts for state funds and non-state funds." Pet. App. 132a (first panel opinion); *see also* Pet. App. 43a-46a (Beezer, J., dissenting); Pet. App. 62a (second panel opinion).

In other contexts where an entity is required to segregate "tainted" money that cannot be used for certain purposes—such as the federal election law requirement to segregate "corporate" and "PAC" money—the Court has unequivocally held that such segregation "burden[s] expressive activity," *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990), and "makes engaging in protected speech a severely demanding task" that "burdens First Amendment rights," *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (1986) (invalidating requirements to "establish a 'separate segregated fund'" and to comply with "[detailed] record-keeping and disclosure obligations"). While the Court has sometimes upheld such segregation requirements if "justified by a compelling state interest," *Austin*, 494 U.S. at 658, and sometimes invalidated them, *see Mass. Citizens for Life*, 479 U.S. at 255-56, all cases are united in acknowledging the obvious point that such segregation is clearly a serious "disincentive" to

speech, *Austin*, 494 U.S. at 658; *see also FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2671 n.9 (2007) (opinion of Roberts, C.J.) (noting that "PACs impose well-documented and onerous burdens"); *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (opinion of Stevens and O'Connor, JJ.) (evaluating, with respect to a segregated-fund requirement for electioneering communications, "whether a compelling governmental interest justifies that burden").

Moreover, here, unlike the campaign finance cases, the employer not only needs to separate funds, but also needs to establish a tracking system to closely monitor all union-related activities, in order to determine how to "allocate" an appropriate amount of employee salaries, etc. to the "private funds" account. A few examples should suffice to establish the burdensome and Byzantine nature of the segregation that is required to comply with AB 1889.

As a threshold matter, if it is even possible that there will be any discussion of unionization, the employer needs to prophylactically establish a separate private-fund account to have monies for dealing with this eventuality. *See* Cal. Gov't Code §§ 16645.2(c), 16645.7(b), 16646(b). How much money to set aside poses a vexing issue both in terms of liquidity (*i.e.*, tying up funds that it might use for other purposes) and liability (*i.e.*, facing a union lawsuit if it fails to set aside sufficient funds to cover the salaries of those engaged in noncoercive speech).

More important, the employer must then determine how to measure and account for the time each employee spends on prohibited union-related activities. For all employees discussing unionization at the employer's behest, the recipient must pay a

percentage of the employee's income out of the "private" account. Even apart from the fact that many employees do not keep detailed time records, it will be quite difficult to arrive at a correct percentage. For example, if a supervisor spends 10% of his time on union-related activity, is it enough to pay 10% of his *salary* out of the private account, or must it be 10% of all income, including year-end bonus and stock options? If the latter, how can this be done until the year-end bonus or options are paid? Does the employer need to allocate salaries of *all* employees "who are required to attend anti-union meetings" by the employer (J.A. 226), or just the salaries of the supervisory employees who are speaking for the employer at the meeting? The Attorney General believes that all salaries need be apportioned, and has sought to impose this requirement through onerous discovery. J.A. 139, 150, 239. What about a meeting where attendance is "voluntary" but is done on company time and employees have an incentive to attend? What is the proper allocation of overhead and utilities for the facilities used to discuss unionization?

It is little wonder that the record contains numerous affidavits from employers stating that AB 1889 would require them "to fundamentally and substantially alter their financial accounting and record-keeping practices and procedures." J.A. 135; *accord* J.A. 158, 168. Indeed, as several employers attested, the "burden and cost associated with [the administrative] change was so extreme that . . . we could not afford it." J.A. 158; *accord* J.A. 163, 168.

AB 1889 makes no provision for a clarifying regulation, and it is difficult to imagine a set of

regulations that would address all of the practical and intricate issues AB 1889 raises. Its enforcement mechanism, moreover, ensures that all judgment calls will be litigated with intrusive discovery into sensitive financial and business records, and that any judicial second-guessing of the employer's judgment will result in significant penalties.

AB 1889 authorizes taxpayer lawsuits, which may be brought by unions to gain leverage in an ongoing organizing dispute with an employer. A union can hale an employer into court simply by alleging that the employer's recordkeeping is "[in]sufficient," a critical term that AB 1889 does not define. At that point, the employer is faced with the legal costs of defending itself, and the near-certainty of a discovery request into its financial and business records. As this Court has previously recognized, the threat of litigation concerning protected speech—where the speaker "must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder"—"must necessarily chill speech" and "reduce the quantity of expression." *Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988) (internal quotation marks and alterations omitted); *Wis. Right to Life*, 127 S. Ct. at 2666 (opinion of Roberts, C.J.) ("the threat of burdensome litigation" will "chill[] speech"). More important, the employer faces the prospect of *treble* damages payable to the State and an award of attorney's fees. "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); *see also Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) ("the remedy of civil penalties is similar to the remedy of punitive damages"). But "[p]unitive

sanctions are inconsistent . . . with the remedial philosophy of the NLRA[.]" *Gould*, 475 U.S. at 288 n.5 (citation omitted); *see also id.* ("The regulatory scheme established for labor relations by Congress is 'essentially remedial.'").

This chilling effect is particularly acute here because the unions that drafted AB 1889 are ready-made and highly motivated plaintiffs for these taxpayer lawsuits. Before AB 1889 was enjoined, unions wrote to the Attorney General requesting investigations of employer expenditures in more than a dozen union organizing campaigns. J.A. 170-232. The evident purpose of these letters was to induce employer "neutrality."

- At the request of SEIU, which was attempting to organize the workers of the Santa Monica Convalescent Centers (J.A. 170-72), the California Attorney General demanded that the Convalescent Centers produce records relating to fees for consulting advice; the salaries of supervisors who met with employees; the salaries of employees who attended those meetings; and printing, mailing, or other costs related to meeting documents (J.A. 138-40). Five days later, SEIU also filed suit against the Convalescent Centers in Los Angeles County Superior Court with respect to approximately $900 in disputed expenditures. J.A. 136; *accord* J.A. 141-48. The case ultimately settled, with SEIU receiving $13,000 in legal fees. J.A. 136.

- Teamsters Local 952 wrote to Laidlaw Transit Services, a contractor providing transportation services for the Orange County Transportation Authority, speculating that Laidlaw "may" have violated AB 1889 in opposing the Teamsters'

organizing campaign, but that "[t]he Union is willing to settle these potential violations, amicably without resort to litigation, if a neutrality agreement can be worked out for the upcoming NLRB election." J.A. 216. When Laidlaw demurred (J.A. 213-14), the Teamsters contacted the Attorney General to pursue an AB 1889 investigation against Laidlaw. J.A. 211-12.

• An attorney for "the largest Union-side labor law firm on the West Coast" discussed the importance of these pressure tactics in a letter to a California Deputy Attorney General. J.A. 235-36. Noting that "several unions in Sacramento Valley have been sending letters to the Attorney General's Office" about possible violations of AB 1889, the attorney explained that the failure of petitioners' challenge to AB 1889 (then pending in the district court) "will have a significant positive effect on various organizing drives that are going on here in the valley." J.A. 236.[8]

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[8] The *en banc* majority blithely dismissed these burdens in a footnote, citing the declaration of an accountant, Nicholas Roth, submitted by respondents for the proposition that AB 1889 "impose[s] no burden greater than numerous other common grant restrictions." Pet. App. 5a. But Mr. Ross' declaration addresses *only* AB 1889's "accounting and recordkeeping requirements" and makes no reference to AB 1889's *qui tam* provision or its imposition of civil penalties. J.A. 280-83. It also completely ignores the requirement that a grantee establish separate, segregated accounts and duplicate employee payroll systems. These additional, costly, and punitive requirements are unnecessary to ensure that grant funds are not misspent and clearly go beyond the general requirements imposed on federal grantees as described in Mr. Ross' declaration. J.A. 282.

The effect of AB 1889, in sum, follows its labor policy purpose: It discourages employers from speaking about unionization and thereby suppresses speech that Congress has determined should be encouraged.

Indeed, AB 1889 would seem to have a more profound and direct negative impact on the federal labor scheme than the funding cut-off preempted in *Gould*. The only deterrent effect of the cut-off there was the *incremental* deterrence attributable to adding that state sanction to the NLRA penalties for the employer's unfair labor practices. And, of course, deterrence there was *desirable* because the activities penalized were violations of the NLRA. Thus, the only interference with the federal scheme in *Gould* was whatever potential inconsistency was caused by adding the state's remedies to those of the integrated federal scheme. This relatively diffuse and intangible interference was thus far less meaningful than the direct damage caused by AB 1889.

C. First Amendment Precedents Only Confirm That AB 1889 Impermissibly Burdens Speech

In the face of all this, the Ninth Circuit nevertheless found that AB 1889 was not preempted because it purportedly did not violate the First Amendment. As the Court has repeatedly explained, however, the constitutionality of a state policy says virtually nothing about whether the policy is preempted. *See Gould*, 475 U.S. at 289 ("What the Commerce Clause would permit States to do in the absence of the NLRA is an entirely different question from what States may do with the Act in place."); *Livadas*, 512 U.S. at 107 ("Such reasoning mistakes our standard for validity under the Equal Protection

and Due Process Clause for what the Supremacy Clause requires."). The fact that the purpose and effect of AB 1889 might be permissible under the First Amendment in no way suggests that its purpose and effect are not preempted under the NLRA.

For the reasons established, AB 1889's purpose is facially preempted because it establishes a regime that deters activity protected by federal labor policy. The cases examining whether different state "value judgments" conflict with the First Amendment can shed no light on this statutory question. Certainly nothing in the First Amendment cases suggests that California's purpose here was permissibly "proprietary" because none of those cases suggests that the funding restrictions involved served such a purpose and, in any event, the Ninth Circuit correctly found that AB 1889 did not serve any such purpose. In light of this, AB 1889's alleged compliance with the First Amendment is entirely beside the point.

To be sure, the First Amendment cases reaffirm the truism that, within certain bounds, a government is "entitled to define the limits of [a] program" that it "establishes." *Rust*, 500 U.S. at 194; *but see Velazquez*, 531 U.S. at 547 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). But this is true, of course, only if the government has the authority to "establish" the policy advanced by the funding restriction. Although California, "in the absence of the NLRA," would obviously have authority to encourage "employer neutrality" on unionization, it has no authority to strike a different balance than the federal statute. *Gould*, 475 U.S. at

290. Thus, AB 1889 is flawed at the threshold level *before* reaching the question examined in the First Amendment cases of whether funding restrictions place impermissible constraints on constitutionally-protected speech. Unlike the First Amendment, the Supremacy Clause in this context does not protect employers' right to speak for its own sake, but in order to preserve the supremacy of federal law against inconsistent state obstacles.

Moreover, to the extent that First Amendment cases do provide guidance on the effect of funding restrictions on speech, they universally recognize that such restrictions are "substantial." *Velazquez*, 531 U.S. at 544. No one, for example, advanced the absurd proposition that Title 10's funding prohibition on "advocat[ing] abortion" did not discourage recipients from advocating abortion. *Rust*, 500 U.S. at 180. Rather, the Court found that, although the funding restriction "*necessarily* discourages" speech about abortion, *id.* at 194, this was constitutionally permissible because the government may preserve the integrity of its federal programmatic message by "refusing to fund activities, including speech" that are inconsistent with that message, *id.* at 195; *see also id.* at 194 ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."); *Velazquez*, 531 U.S. at 541 ("We have said that viewpoint-based funding decisions can be sustained in . . . instances, like *Rust*, in which the government used private speakers to transmit specific information pertaining

to its own program.") (internal quotation marks omitted).

In short, the First Amendment cases confirm that funding restrictions do have the "real effect" of "discouraging" speech. That such an effect does not violate the First Amendment when needed to advance the government's interest in a uniform programmatic message in no way suggests that such an effect is consistent with the NLRA when a state acts to discourage federally-protected speech.[9]

IV. EXEMPTING REGULATORY EXERCISES OF THE STATE SPENDING POWER WOULD LEAD TO THE BALKANIZATION OF FEDERAL LABOR LAW

More generally, acceptance of the Ninth Circuit's "use" restriction distinction would severely undermine the overriding purpose of the NLRA, which federalized labor-management relations law because of "the perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict." *See Lockridge*, 403 U.S. at 286; *accord* LABOR MANAGEMENT RELATIONS at 3 ("Prior to the enactment of the [NLRA] in 1935, the law regulating

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[9] AB 1889, furthermore, is *not* designed to preserve a "programmatic message of the kind recognized in *Rust*." *Velazquez*, 531 U.S. at 548. It does not regulate any speech between the grantee and the *public* being served, but only *internal* communications with employees about union organizing efforts which do not affect the service provided. An employer's discussion with employees about unions does not dilute or divert the government-desired message in the way that, for example, a pro-drug message to clients would undermine an anti-drug program.

labor relations and union activities was a crazy quilt of state conspiracy doctrines, common law torts, and state statutes of general application applied to union activities."). Left free to pursue their own idiosyncratic labor policies through non-proprietary exercises of their spending power, states would quickly balkanize labor (and other) law in the United States.

In striking down the Wisconsin debarment law in *Gould*, this Court noted that four other states had enacted similar statutes and that "[e]ach additional statute incrementally ... detracts from the 'integrated scheme of regulation' created by Congress." 475 U.S. at 288. An even greater state encroachment exists today. There are on the books at least five other state laws that, like AB 1889, affect federal labor policy through conditions on the use of state funds.[10] In addition, laws materially identical

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[10] *See* CAL. WELF. & INST. CODE § 4638 (West 2007) (regional centers for persons with developmental disabilities "shall not use state funds allocated to the corporation for operating the center for activities directly related to influencing employees of the center regarding their decision to organize or not to organize"); ME. REV. STAT. ANN. tit. 22 § 1861 (2004) (prohibiting health care institutions from using "funds received from the State" for the purpose of engaging "persons with the intent to interfere with, inhibit or disrupt the free exercise of the right of all employees to organize"); N.Y. LAB. LAW § 704(11) (2002) (unfair labor practice for an employer "[t]o utilize any state funding appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization, or to discourage an employee from participating in a union organizing drive"); N.Y. SOC. SERV. LAW § 336-f(4)(h) (2003) (employers providing job training to public assistance recipients "are prohibited from using public assistance funds to encourage or discourage (cont'd...)

to AB 1889 are being, or have recently been, considered in eight states.[11] Related state bills, which would also hinder employer speech through spending restrictions, have also been proposed in the past year.[12]

Although these state laws and bills are, like AB 1889, decidedly pro-union, the slippery slope of allowing states to further their labor policies through spending restrictions could have anti-union effects as well. A state with a different view of "neutrality" than California, for example, might enact the inverse of AB 1889, prohibiting the use of "state funds" for costs associated with the voluntary recognition of a union and allowing the use of "state funds" to engage in speech opposing unionization. Similarly, although

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(...cont'd)

membership in, or participation in the activities of, any employee organization"); OHIO REV. CODE ANN. § 5119.62 (LexisNexis 2004) (providing that "community mental health agencies shall not use state funds for the purpose of influencing employees with respect to unionization").

[11] *See* H.B. 578, 2007 Legis., Reg. Sess. (Ala. 2007); H.B. 757, 95th Gen. Assemb. (Ill. 2007); H.B. 3267, 185th Gen. Ct., Reg. Sess. (Mass. 2007); H.B. 4443, 94th Legis., 1st Reg. Sess. (Mich. 2007); H.F. 1224, 85th Legis., Reg. Sess. (Minn. 2007); S. 2701, 212th Legis. (N.J. 2007); A.B. 2222, 212th Legis. (N.J. 2006); H.B. 2892, 74th Legis. Assemb. (Ore. 2007); H.B. 492, 105th Gen. Assemb. (Tenn. 2007).

[12] *See* H.B. 5695, Gen. Assemb. (Conn. 2007); H.B. 533, 94th Gen. Assemb. (Mo. 2007); S.B. 181, 94th Gen. Assemb. (Mo. 2007); A.B. 5853, 230th Legis. Sess. (N.Y. 2007); H.B. 1502, 190th Gen. Assemb. (Pa. 2007); H.B. 1503, 190th Gen. Assemb. (Pa. 2007); H.B. 2089, 60th Legis., Reg. Sess. (Wash. 2007); S.B. 5940, 60th Legis., Reg. Sess. (Wash. 2007).

states may not bar a union engaged in a dispute with an employer from appealing to the employer's customers or suppliers to stop doing business with the employer, *see Morton*, 377 U.S. at 255, a state legislature could, under the *en banc* majority's rationale, deter state contractors from agreeing to support such secondary boycotts by precluding them from using "state funds" to pay for the replacement goods or services that would have been provided by the employer. In sum, whatever a pro-union state legislature might do on behalf of unions with such regulatory freedom, a pro-employer state legislature could do on behalf of management. Such a loophole would plainly frustrate the NLRA's purpose of striking a fair balance between labor and management that would apply uniformly around the country.

Allowing states to use their power of the purse—which is estimated to exceed $1 trillion dollars annually, *see* National Association of State Budget Officers, *The Fiscal Survey of States* 2 (June 2007), *available at* http://www.nasbo.org/publications.php (last visited Jan. 8, 2008)—in pursuit of their own labor goals would leave a gaping hole in NLRA preemption. In addition to the 50 states, there are over 3,000 counties and other localities that could, like California, impose labor-related spending restrictions on their "funds" or otherwise exercise the spending power to implement their particular labor policies. *See, e.g., Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 280 (7th Cir. 2005) (holding preempted Milwaukee County ordinance requiring county contractors to enter into "labor peace agreements"). The difficulties of tracking and complying with such laws is hard to

overstate, particularly if the laws conflict with one another. Employers would be required to trace each dollar received and comply with the particular governmental regulation applicable to that dollar. Given the opaque and ill-defined administrative requirements found in AB 1889 alone, this would result in an accounting nightmare, with each state, county, and municipality free to impose its own unique accounting, reporting, and segregation requirements. The burden on national and international businesses of following myriad different and conflicting labor standards, depending on the predilections of state and local jurisdictions, is precisely what Congress intended to avoid in federalizing labor-management relations law. *See Nash-Finch*, 404 U.S. at 144. Indeed, if regulatory exercises of the state spending power are immune from ordinary preemption principles, the damage to the uniformity of federal law would not be limited to the labor context. Through reticulated regulatory regimes governing the use of "state funds," states could manipulate the conduct of virtually any entity with which they have some financial interaction, heedless of the dictates of federal law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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January 9, 2008